

## CONDEMNATION OF STRUCTURES

JOHN J. DUFFEY\*

The existence of a building or structure upon property to be condemned for highway purposes has had important effect upon appropriation procedures and upon the rights of both condemnor and landowner. The recent amendments to Ohio Rev. Code Sections 5519.01 and 5519.03 more nearly equate appropriation of vacant property and the appropriation of property containing a building or structure.

In the appropriation of vacant property, the director of highways makes a finding as to the necessity for the taking. Included in such finding is a determination of the value of the property, together with the amount of damages to residue. Upon depositing that sum in court for the use and benefit of the owner, the statute provides that "thereupon the director may take possession of and enter upon said property. . . ."<sup>1</sup>

The effect of this statute is to grant the director an option to enter and take possession. If he does not enter or change the property appropriated, he may abandon the appropriation at any time not later than thirty days after the final determination of the cause.<sup>2</sup> If the director chooses to take possession or change the property, an appeal by the landowner does not affect the director's right to retain possession. However, the director loses the right to abandon the proceedings.<sup>3</sup>

Both Ohio Rev. Code Sections 5519.01 and 5519.02, prior to the recent amendment, applied to "property" to be appropriated. Although neither referred expressly to buildings or structures, they appeared to establish the procedure for the appropriation of both vacant and occupied property. However, Ohio Rev. Code Section 5519.03, requires the jury in assessing compensation to make separate findings for the value of the land and the value of the structure. Prior to its recent amendment, the statute also provided:

Title to said structure shall vest in the state with the right to enter upon the site of said structure and adjoining land upon which it is located for the purpose of removing the structure therefrom.

In 1951, a Court of Appeals case interpreted Section 5519.03 as modifying the power of entry granted the director under Sections 5519.01 and 5519.02.<sup>4</sup> Under the view in that case, the vesting of title

---

\* Assistant Professor, College of Law, The Ohio State University.

<sup>1</sup> Ohio Rev. Code §5519.01. The statute further provides for notice to the landowner and the procedure for an appeal to the courts from the director's determinations.

<sup>2</sup> Ohio Rev. Code §5519.02.

<sup>3</sup> Ohio Rev. Code §5519.02.

<sup>4</sup> *In Re Appropriation of Easement for Highway Purposes*, 90 Ohio App. 471, 107 N.E. 2d 387 (Madison County, 1951). M.C.O. 90 Ohio App. XXXV. What is apparently the same case is reported as *In Re Stickels*, 64 O.L.A. 356, 104 N.E. 2d 186.

to a structure is stayed, and entry upon the property prohibited until after the assessment of compensation by the jury.

This distinction in the right of entry between vacant property and property occupied by a structure had ramifications upon the date of valuation. The general rule is, of course, that value is determined as of the time of the taking. In the case of vacant property, when entry is made after deposit, the time of taking, at the latest, would appear to be the time of entry. If the right of entry was not exercised, the time of taking would appear to be that of trial.<sup>5</sup> Having held that the vesting of title and right of entry were stayed until assessment by the jury in the case of property occupied by a structure, the court followed through by holding that the time of taking and therefore the date of valuation, was the time of trial.<sup>6</sup>

This interpretation of Section 5519.03 obviously could substantially delay a highway project. On the other hand, the entry and destruction of a structure prior to trial could be seriously prejudicial to the landowner's case. It would clearly deprive the jury of any opportunity to view the structure at all, or at least in its original state depending upon the extent of the taking.

In amending Sections 5519.01 and 5519.03, the legislature has apparently compromised between the interest of the state and the need to protect the landowner. Section 5519.01 has been amended to specifically permit the director upon deposit of the money in court to "take possession of and enter upon said property, *including the buildings and structures thereon. . .*" (Emphasis supplied). This would appear to grant the director power to take possession immediately upon depositing the money in court. However, Section 5519.03 was amended by adding the following sentence:

The owner or occupant of such structure shall vacate the same within sixty days after service of notice as required under the provisions of section 5519.01 of the Revised Code, after which time the director may remove said structures.

Construing these two statutes together and trying to give full effect to both suggests the conclusion that the director may enter upon and take possession of the land, but cannot, without the owner's or occupant's consent, take possession of any structure prior to the expiration of sixty days from the service of notice. But, it is arguable that no right of entry even as to the land accrues until after the expiration of the time period.

Either interpretation resurrects the question of the proper date for valuation. As noted *In Re Appropriation of Easement* ties the time of valuation to the time possession is taken, or the time of trial, whichever is earlier. Following that view it would appear that where the director

---

<sup>5</sup> The highway department has argued that the taking occurs at the time the director files his resolution. See *In Re Appropriation of Easement*, *supra*, note 4.

<sup>6</sup> *Id.* at 479, 107 N.E. 2d 391.

exercises his power of entry, the latest date for valuation would be that of taking possession of the structure. But if the director may enter upon the land immediately after deposit in court, a strong argument can be made for valuation at that date. Certainly it would be undesirable to have one date of valuation for the land and another for the structure. On that basis, it would seem most likely that a court would take the date of the taking of the structure. That in turn suggests that the proper interpretation of the statutes is that entry without consent cannot be made as to either the land or the structure until after sixty days from the service of notice.

The legislature, in an apparent attempt to reconcile its desire to expedite construction with its desire to protect the landowner, also added the following provision to Section 5519.03:

In the event such structures are removed before the jury has fixed the value of the same, the director, before such removal, shall cause an appraisal to be made by three persons, one to be appointed by the owner, one by the county auditor, and one by the director, and such appraisal may be used as evidence by the owner or director in the trial of said case but shall not be binding on said owner, director or the jury, and the expense of said appraisal shall be approved by the court and charged as costs in said case; shall cause pictures to be taken of all sides of said structure; and shall compile a complete description of said structure, which he shall preserve as evidence in said case to which the owner or occupants shall have access.

The provision for appraisers smacks somewhat of arbitration. It apparently contemplates that the three appraisers will arrive at a single appraisal. While one can at most only guess on how a jury will react to particular evidence, such an appraisal ought to be fairly persuasive. The wisdom of this appraisal provision cannot be judged until there has been some trial experience. The choice of the county auditor as the "neutral" seems somewhat strange. The usual practice has been to use a judge.

The requirement of pictures, and of a complete description, seems good common sense.

One further innovation in the statute should be noted. Where the owner appeals the director's valuation and receives a jury trial, Section 5519.02 provides as follows:

If the court finds that such appeal has been properly perfected, and that proceedings are substantially regular, the court shall transmit to the director the money deposited in the court for the use and benefit of the appellant.

However Section 5519.03 as amended provides:

Furthermore, where a building or structure is taken and the owner has appealed from the amount of compensation and damages as fixed by the director, at anytime before the termination of said case, said owner may apply to the court in which said case is pending to withdraw the portion of the deposit

representing the sum fixed for said structure and such withdrawal shall in no way interfere with said case except the sum so withdrawn shall be deducted from the sum of the final verdict. Upon such application being made the court shall direct the clerk of courts to pay said sum to such owner or owners.

Giving effect to the apparent purpose of the amendment, it would appear that under Section 5519.01, the court should transmit to the director only that portion of the deposit which is in excess of the compensation allocated by the director to the structure. Obviously the director must separately state the value of the structure in his resolution.

Some difficulty may be encountered in implementing this provision for drawing upon the deposit. For example, problems will be found in cases where the title to the structure is disputed or even if the title is merely doubtful.

It is to be hoped that no jury will complicate matters by returning a total compensation below the amount established by the director for the structure!